No. 14,630

In the

United States Court of Appeals

For the Ninth Circuit

LOUIS P. LUTFY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief for Appellant

Upon Appeal from the United States District Court for the District of Arizona

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SUBJECT INDEX

*Citations refer to 99 L.Ed Advance Sheet No. 3, dated December 20, 1954.

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STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

The appellant Louis P. Lutfy, hereinafter referred to as defendant as in the court below for the sake of convenience, is a physician and surgeon and practicing in the City of Phoenix, State of Arizona. Defendant was indicted February 26, 1953 (3-7)* on five counts charging violations of 26 U. S. C. 145(b), attempt to defeat and evade income taxes for the calendar years 1946, 1947 and 1948.

With respect to the years 1946 and 1947 wherein separate returns were filed by the defendant and his wife, Bertha A. Lutfy, defendant is indicted on two counts for

*Figures appearing in parentheses in this Brief refer to page numbers of the printed Transcript of Record and are inclusive.

each of these two years, Counts II and IV, respectively, charging that the defendant filed or caused to be filed false and fraudulent income tax returns for and on behalf of the said Bertha A. Lutfy (4-6). With respect to the year 1948 a joint return was filed by the defendant and Count V of the Indictment relates to the said return filed on or about February 8, 1949, being the tax return on behalf of himself and his wife for the year 1948.

Counsel for defendant promptly filed a motion for a bill of particulars (7-10) and a bill of particulars was promptly furnished by the Government (11-14), setting forth specifically the charge that certain specific sums of money constituting income was received by the defendant during each of the prosecution years from four sources, namely, interest, rental receipts, capital gains and business income, and which sums it is alleged were not reported by the defendant in the appropriate tax returns for those years. The bill of particulars set forth specifically that "It is not alleged that the defendant took deductions not allowed by law.", and respecting the Counts numbered II and IV, "It is not alleged that the defendant caused Bertha A. Lutfy to take deductions not allowed by law."

After arraignment on May 4, 1953 (15), wherein the defendant entered pleas of not guilty to all counts, there was a substitution of counsel for defendant and the cause was transferred to the Tucson Division for trial (15).

On December 15, 1953, the Government filed an amended bill of particulars (16) wherein the Government advised the defendant that the omitted income for the calendar years 1946 to 1948, inclusive, "* * * based upon annual increase in the defendant's net worth for the years 1946-1948, inclusive, plus expenditures in those years".

Defendant's counsel thereupon moved the court for an order requiring further particulars of the Government (17-20), and thereupon the Government made reply to the motion filing certain further particulars (20-22), wherein it was stated that all personal deductions for the prosecution years were allowed as claimed with the exception of medical expenses claimed in 1946 disallowed in part, and the theft of a Lincoln automobile claimed in 1947 disallowed in part.

The Government further replied that "All nondeductible personal expenses taken as business deductions have been disallowed." In this pleading the Government alleged respecting defendant's net worth, the following:

"(a). Net worth, December 31, 1945. $ 61,248.40
(b). Net worth, December 31, 1946. 71,886.55
(c). Net worth, December 31, 1947. 87,739.18
(d). Net worth, December 31, 1948. 115,732.01" (21)

In this pleading the Government asserted that the defendant and his wife made the following expenditures:

"$20,336.23 in 1946.
27,591.28 in 1947.
36,520.72 in 1948." (21)

In the trial of the case the Government's net worth statement (Government's Exhibit No. 33 in evidence) showed defendant's net worth as of December 31, 1945 in the sum of $58,337.20, December 31, 1946—$65,588.43, December 31, 1947—$74,265.11, December 31, 1948—$97,294.73.

Count I of the Indictment alleged the total tax due the Government to be the sum of $2,239.44. The Government's Exhibit No. 34 in evidence showed the correct sum to be $1,073.57.

Count II of the Indictment alleged a total tax liability of $2,077.80. The Government's Exhibit No. 34 showed the amount to be $950.70.

Count III showed the total tax liability to be $3,349.76. The Government's Exhibit No. 34 showed the amount to be $2,471.42.

Count IV of the Indictment alleged a total tax liability of $2,931.53. The Government's Exhibit No. 34 showed the amount to be $2,309.92.

Count V of the Indictment alleged a total tax liability of $8,198.22. The Government's Exhibit No. 34 showed the amount to be $6,362.20.*

The cause was tried in the Tucson Division before a jury between the following dates: September 7 and September 16, 1954 (23-37). The case was submitted to the jury on the net worth theory (445-448). The jury returned a verdict finding the defendant guilty on each of the five counts (37).

Defendant filed motion for new trial (37-40) which was by the court denied on October 18, 1954 (41-42). Judgment and sentence was rendered October 18, 1954, committing the defendant to the custody of the Attorney General for imprisonment for a period of eight months on each of the first four counts, said terms of imprisonment to run concurrently, and on Count V defendant was fined in the sum of $5,000.00.

Upon timely application and the filing of a notice of appeal (45-46) the court granted a stay of execution and admitted the defendant to bail pending his appeal (44).

The court entered an order extending the time for filing the record on appeal to February 1, 1955 (42). Statement of

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*Of the above sums Government's Exhibit 34 showed the following payments with respect to each of the five counts: Count I—$248.88; Count II—$153.88; Count III—$626.03; Count IV—$521.53; Count V—$3,265.36.

points to be relied on by defendant in this appeal was filed in the district court October 22, 1954 (48-51) and a revised statement of points filed in this Court February 1, 1955 (453-457). Within the time provided by the order of the district court this appeal was perfected and the transcript of the record filed and docketed in this court.

JURISDICTION OF THE DISTRICT COURT

The district court had jurisdiction of this cause because it was a criminal case instituted by a Grand Jury Indictment (3-7) in the United States District Court for the District of Arizona, which charged the appellant with violations of Title 26 U.S.C. 145(b) and the violations charged are cognizable only by the United States Courts which have exclusive jurisdiction of crimes and offenses defined by Acts of Congress, and the commission of which are by law made criminal offenses against the authority of the United States. Jurisdiction of the District Court is invoked under the following statutes: Title 28 U.S.C.A. Sections 82, 132, and Title 18 U.S.C.A. Section 3231.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C.A. Section 1291, and 28 U.S.C.A. Section 41.

The order of the court denying appellant's motion for a new trial and the judgment and conviction appealed from were entered and sentence was imposed on October 18, 1954 (41-43). Subsequently, the appeal was duly and timely taken and in the manner provided by Rule 37(a)(2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

A detailed statement of this case would run to unreasonable length, and therefore the statement which follows is greatly condensed and covers only those points which appear to be salient and relevant to this appeal.*

One of the witnesses for the Government was Mrs. Raye Way, formerly receptionist, medical stenographer and bookkeeper for the defendant between September 1947 and May 1949 (97), and presently wife of the Justice of the Peace, Magistrate and Ex-Officio Coroner at Williams, Arizona (109). This Government witness testified that she kept the books of the defendant in his professional practice, and that she entered daily in the log book which he used for the keeping of his records each item of cash, each check received and each charged item (98), and that she kept a complete record in this log book (99). She further testified that at the end of each day she and the defendant together checked the entries in the daily log book for mistakes and when found such mistakes were corrected, and that defendant was very particular about such matters and in the performance of her duties stressed accuracy at all times (100, 111, 113). She further testified that she assisted Dr. Lutfy in the preparation of figures for his income tax returns (101-105), for the calendar years 1947 and 1948 (119-124).

Mrs. Way also testified that she had visited in the home of the defendant and had been surprised at the plain and modest conditions under which he lived (109). This witness also testified that she was familiar with the type of books kept by the defendant, having seen the same type of records in other doctors' offices (114), and that to the best of her

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*The writer assumes that counsel for the Government will supplement this statement of the case in the event that the same is not sufficiently complete for his purposes.

ability she kept a full, true and accurate record of all professional income (115, 126).

This witness also testified that at no time did the defendant ever insinuate or suggest that any item of business or professional income ever be omitted or treated in any manner likely to conceal or deceive (125).

The Government brought to the stand Mr. Howard H. Whitsett (142), an Internal Revenue Agent of 14 years experience who had had a three year accounting course, but had never been a Certified Public Accountant (217-218). This witness related a detailed history of the investigation which he and others made of the defendant's books and records (145-156). This witness then presented to the Court a previously prepared and lengthy computation sheet, referred to in the record as defendant's net worth statement, being Government's Exhibit 33 in evidence (152-160). In answer to a question asking for an explanation of Whitsett's computations, referring to Exhibit 33 in evidence, the witness stated:

> "From 1928 to 1938 there was no record of return on file." (163)

and over objection the Court allowed him to proceed to go into a system of computations by which the witness was allowed by the Court to compute the defendant's gross income from 1934 through 1945 and to estimate living expenses for those years (164-166), and the Court denied defendant's motion to strike all of these answers of the witness concerning prior years. The witness stated that the computation from prior years resulted in his arriving at the figure of $1,000.00 cash on hand at the beginning of the prosecution period (166). In this connection the Government's proof had already shown that on or about Novem-

ber 24, 1944 the defendant had converted War Bonds into cash in the amount of $14,195.12 (78), and the Government produced no evidence to show what became of this sum.

The Government's accountant admitted that he learned of the repayment in 1944 to the defendant of the sum of $4,400.00 which he had previously loaned his mother (244), but no allowance was made for that in the net worth statement or any explanation of where that money went. Also the Government witness admitted that he learned of an unrepaid loan wherein the defendant, during the prosecution period, borrowed either $3200.00 or $3500.00 in cash from his mother-in-law, Mrs. Linsenmeyer (243-244, 289), but nothing appears in Exhibit 33 to indicate that any account was taken of this cash, and there is no indication from the evidence that any investigation was made by the Government to ascertain the truth of the facts, nor was there any reflection in Exhibit 33, or elsewhere, of any cash gifts to the defendant or his wife by Ottelia Linsenmeyer, who was, according to the Government's evidence, quite a wealthy woman prior to her death in 1951 and who made a habit of making gifts to the families of her children (57-59; 282-283), and in connection with which there was evidence of cash gifts averaging $500.00 per year during the prosecution period (284).

Nor was there any account taken in the Government's Exhibit 33 of the sale of a piano in 1948, the proceeds of which was $475.00 in cash (301).

During 1947 a Lincoln automobile belonging to the defendant was stolen and he claimed a deduction as a casualty loss in that year of his alleged cost of the automobile of $6700.00, of which the witness Whitsett, in preparing his Exhibit 33, says, "I disallowed in that particular year." (199). In connection with this item the evidence was that

the London Assurance Company refused to pay the loss arising out of the theft of this automobile and that they were sued and defendant eventually prevailed in his suit (290), and upon receiving payment from the insurance company treated the proceeds thereof as income and paid taxes upon the sum recovered (233-234).

The Government witness, in preparing the net worth statement, Exhibit 33 in evidence, took no account of life insurance policies held by the defendant in the amount of $45,000.00 (291) and apparently made no investigation to determine whether or not any of the funds used by the defendant during the prosecution years was obtained by surrender of any such policies in return for the cash values thereof. This Government witness, who was the only witness pertaining to the defendant's net worth, refused to affirm or deny that in the course of his investigation he had made to the defendant the following statement:

> "You doctors are getting away with murder. I am going to take away all your deductions and let you fight to try to get them back." (249)

The witness Whitsett treated two real estate transactions as short-term capital gains, taxable in the full amount (221-231), although the facts show that both transactions with the elements of ownership extended over a period of more than six months.

The witness Whitsett freely stated his opinions on matters both legal and factual and related hearsay testimony (148, 149, 150, 197-199, 200, 201, 230-231, 234-235, 241, 246).

The Court permitted the Government to go into the matter of depreciation schedules (see Government's Exhibit No. 27 in evidence) (213) and denied defendant's motions to strike or otherwise exclude testimony pertaining to

depreciation as being outside the scope of the bill of particulars (189, 190, 191).

Defendant presented the witness R. Dale Moser, a Certified Public Accountant (325), who testified that from his examination of the defendant's records that he would say that the defendant kept a regular set of books, and that the defendant's books were about average for a professional man in his position (336-337). He further testified that in 1946 defendant's books showed 2,382 cash transactions, in 1947 2,955 cash transactions and in 1948 3,891 such transactions (366), and that as for discrepancies out of the 3,891 cash transactions in the year 1948 he found 14 errors in the log book, consisting of information recorded on the patient's cards which had not been entered in the daily log book (434).

This witness testified that he had taken the Government's figures as set forth in Government's Exhibit No. 33 (342) and that as of the end of 1946, based on the Government's own figures, defendant would have $2,244.22 available funds on hand over and above the income reported and the amount he had spent in the net gain of assets (343, 346). That as for the end of 1947, the second year of the prosecution period, defendant had available funds over and above enough to account for his net worth at the end of said year in the amount of $5,025.35 (350); that as of the end of 1948, taking into account the entire three year prosecution period, the defendant had net additional funds available for the entire period of $2,180.62 more than was necessary to arrive at the net worth as alleged by the Government (352-353).

This accountant treated both the real estate transactions, which the Government's accountant disallowed as long term capital gains, as such long term capital gains (346-347).

This witness also discussed the depreciation aspect of the

case and demonstrated that in each of the prosecution years the depreciation computed on the basis of the Government's cost figures amounted to a greater sum than that taken by the defendant. In the year 1946 the defendant could have claimed, by accepted methods allowable by the Government, $120.56 more of depreciation than he actually did claim, and in the year 1947 he could have claimed $1,302.25 more than he actually did claim, and for the year 1948, $1,331.80 more than he actually did claim (362-365).

QUESTIONS INVOLVED—HOW RAISED

This appeal raises principally the following questions:

1. Did the district court commit error in denying defendant's motion for acquittal made at the conclusion of the Government's evidence?

2. Did the district court commit error in refusing defendant's motion to strike all evidence pertaining to net worth?

3. Did the district court err in submitting the case to the jury as a net worth case?

4. Did the district court err to the prejudice of the defendant in admitting the testimony of the witnesses McGurkin (53), Beale (58, 86), Fairfield (68) and Herre (71)?

5. Did the district court err to the prejudice of the defendant in admitting over objection Government's Exhibits No. 6, 9, 10, 13 and 27?

6. Was the defendant deprived of a fair and impartial trial by reason of volunteer statements and opinions injected by Government witnesses over defendant's objections, or of such character as could not be guarded against by objection on the part of defendant?

7. Did the district court err in receiving evidence offered on behalf of the Government which was outside the scope of the Government's bill of particulars?

The foregoing questions were raised in the course of the trial and proceedings subsequent thereto by objections to the reception of evidence, motions to strike evidence, a motion for judgment for acquittal at the conclusion of the Government's case and also at the conclusion of all the evidence in the case.

SPECIFICATIONS OF ERROR

I.

The district court erred in denying defendant's motion for acquittal made at the conclusion of the Government's evidence in the case, for the reason that such evidence was largely incompetent and was otherwise insufficient to establish the crime charged.

II.

That the district court erred in denying defendant's motion for acquittal made at the conclusion of all of the evidence in the case (444) for the reason that the evidence was largely incompetent and was otherwise insufficient to establish defendant's guilt as charged.

III.

The district court erred in denying defendant's motion to strike all evidence of defendant's net worth (275-278) for the reasons that the Government failed to meet established standards for proof of net worth in the following particulars:

1. The Court allowed Government witness to engage in fantastic process of computation, presumably to arrive at cash on hand for beginning of period (163-166).

2. Government's witness ignored $14,195.12 in Government bonds cashed by defendant on or about November 24, 1944 (78).

3. Government witness ignored repayment to the defendant in 1944 of prior loan of $4,400.00 (244).

4. Government witness made no effort to show what had happened to cash admittedly received by defendant in 1944 in the total amount of $18,595.12.

5. Government's proof showed no competent corroboration of defendant's extra-judicial statement (if such was made) as to amount of cash available at the beginning of the prosecution period. (162, 165-166)

6. Government witness as to net worth unable to testify that he had accounted for all of defendant's assets at the beginning of prosecution period (260).

IV.

That the district court erred in submitting the case to the jury as a net worth case for the following reasons:

(1) Defendant kept a regular set of books of average quality (336-337).

(2) Every item of professional income was entered in the books (98, 115, 126).

(3) Defendant stressed accuracy in the keeping of books and records (100, 111, 113).

(4) True and correct books and recods were kept and made available to the Government.

(5) Net worth evidence made no effort to give consideration to unrepaid loan from Mrs. Linsenmeyer in the amount of $3500.00 in 1947 (244, 289).

(6) Government ignored assets in the form of life insurance in the sum of $45,000.00 (291, 309).

(7) Government ignored gifts of money received during prosecution period (259, 284, 301).

V.

The district court erred in submitting this case to the jury on the net worth theory for the reason that the Government's net worth evidence was reconcilable with a full and true reporting of all income by the defendant and was fully answered by certified public accountant testifying on behalf of defendant (339, 340, 343, 345-346, 350-353, 360-362).

VI.

The district court erred in admitting, over objection, the following Government Exhibits Nos. 6, 9, 10, 13 and 27 for the reason that the same were incompetent, irrelevant, immaterial, prejudicial, of no probative value and outside the Government's bill of particulars and amendments thereto.

VII.

That the district court failed to afford the defendant a fair and impartial trial, or defendant's rights were prejudiced by the United States Attorney by calling as witnesses the following persons whose inability to give competent or credible testimony must have been known to the United States Attorney beforehand, but could not have been known to defendant's attorney: Clarence J. Beale (59-86), Robert F. Herre (71-77), John F. Fairfield (68-71).

VIII.

That the district court erred, notwithstanding timely objections, in permitting Government witness to volunteer numerous prejudicial statements that could not be guarded against by defendant and in allowing Government witness to broadcast opinions on technical legal questions and thus invade the province of the jury (148, 149, 150, 197-199, 200, 201, 230-231, 234-235, 241, 246).

IX.

The trial court erred, over objection and motion to strike, in permitting the Government to depart its bill of particulars, amended bill of particulars and supplement thereto, especially in regard to proof of depreciation and the admission in evidence of Exhibit No. 27 over objection (146-148; 174, 175-177; 179-187, 213).

ARGUMENT

Introduction.

This Honorable Court will observe that this appeal was instituted on October 18, 1954. Thereafter on December 6, 1954, the Supreme Court of the United States announced decisions in the following cases:

Holland v. U. S., 99 L.Ed. 127, 75 S.Ct. ....., ... U.S. .....;*

Friedberg v. U. S., 99 L.Ed. 140, ... U.S. .....;*

Smith v. U. S., 99 L.Ed. 143, ... U.S. .....;*

U. S. v. Calderon, 99 L.Ed. 152 ..... U.S. .....;*

Sullivan v. U. S., 99 L.Ed. 159, ... U.S. .....*

The occasion for the granting of writs of certiorari in the foregoing cases is stated by Mr. Justice Clark in *Holland v. U. S.,* supra, page 131:

> "In recent years, however, tax evasion convictions obtained under the net worth theory have come here with increasing frequency and left impressions beyond those of the previously unrelated petitions. We concluded that the method involved something more than the ordinary use of circumstantial evidence in the usual criminal case. Its bearing, therefore, on the safeguards traditionally provided in the administration of criminal justice called for a consideration of the entire

*Citations refer to 99 L.Ed. Advance Sheet No. 3, dated December 20, 1954.

theory. At our last Term a number of cases arising from the Courts of Appeals brought to our attention the serious doubts of those courts regarding the implication of the net worth method. Accordingly, we granted certiorari in these four cases and have held others to await their decision."

While it appears that the decisions in the above cases have to an extent disposed of some of the points made in the defendant's motion for a new trial and statement of points relied upon on appeal in the case at bar, there remain substantial questions arising out of the particular facts of this case upon which this defendant is entitled to review by this Court.

I. The Evidence in This Record Is Insufficient to Meet Established Standards of Proof to Support Conviction of Income Tax Evasion Based on Net Worth Theory.

(Specifications of Error Nos. I, II, III, IV and V)

In the case of *Holland v. U. S.,* supra, 132, 133, 134, 135, the Supreme Court discussed at some length the dangers inherent in the net worth theory of proof in criminal prosecutions for attempted evasion of income taxes, and commented that although the net worth method is useful to the Government and has come into wide use,

> *"Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use."* (Emphasis supplied.)

Contrasting the problems of the use of this method in such cases as *Capone v. U. S.,* 51 F.2d 609, 76 A.L.R 1534, *Guzik v. U. S.,* 54 F.2d 618, *U. S. v. Johnson,* 319 U.S. 503, 87 L.Ed. 1546, 63 S.Ct. 1233, with its use in the less spectacular and more ordinary income tax evasion, the Court said:

> "* * * *and its use in the ordinary income-bracket cases greatly increases the chances for error. This leads us to point out the dangers that must be consciously kept in mind in order to assure adequate appraisal of the specific facts in individual cases." (Emphasis supplied.)

In discussing what the court describes as a "favorite defense", namely the claim of the taxpayer that he had substantial cash on hand at the beginning of the prosecution period available for expenditure during the prosecution period, the Court points out that frequently the Government agents obtained "leads" indicating specific sources from which the cash has come, and with reference to the duty of the Government to investigate such leads, said:

> *"Were the Government required to run down all such leads it would face grave investigative difficulties; still its failure to do so might jeopardize the position of the taxpayer."* (Emphasis supplied.)

Concerning an additional danger involved in this method for the innocent defendant, the Court said:

> *"As we have said, the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously, such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth. There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."* (Emphasis supplied.)

The Court also recognizes the difficulty which would confront many honest taxpayers in the matter of trying to explain the increase in his net worth if required to do so:

> "* * * *he may be entirely honest and yet unable to recount his financial history. In addition, such a rule would tend to shift the burden of proof. Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Government's case by showing loose business methods or losing the jury through his apparent evasiveness. Of course, in other criminal prosecutions juries may disbelieve and convict the innocent. But the courts must minimize this danger." (Emphasis supplied.)

The Court also had a special warning applicable to the case at bar where the books and records of the taxpayer appear correct on their face:

> "*But when the Government uses the net worth method, and the books and records of the taxpayer appear correct on their face, an inference of willfulness from net worth increases alone might be unjustified, especially where the circumstances surrounding the deficiency are as consistent with innocent mistake as with willful violation. On the other hand, the very failure of the books to disclose a proved deficiency might indicate deliberate falsification.*" (Emphasis supplied.)

The Court also recognized that a realistic evaluation must be made of any alleged statements made by the taxpayer to revenue agents in the course of their investigation, saying:

> "*But when a revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth. Moreover, the prosecution may pick and choose from the taxpayer's statement, relying on the favorable portion and throwing aside that which does not bolster its position. The problem of corrobora-*

*tion, * * * therefore becomes crucial."* (Emphasis supplied.)

The Court's general discussion of the net worth method is summarized as follows:

> *"While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that is cannot be met merely by the application of general rules. * * * Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute."*

Applying some of these principles to the case at bar, counsel wishes to point out to the Court that according to the Government's evidence the defendant, on or about November 24, 1944, converted to cash Government bonds in the amount of $14,195.12 (78). The evidence also disclosed that in 1944 the mother of the defendant repaid to him a loan which he had previously made to her and he thereby received cash in the amount of $4,400.00 (244).

This made a total of $18,595.12 in cash which the evidence definitely showed to be in the hands of the defendant in the year 1944. The Government not only made no effort to show what had happened to this cash or to show that the defendant did not have the cash, or a substantial part of it, on hand at the beginning of the prosecution period and expended it during the prosecution period, but, on the contrary, the Government, ignoring this very substantial sum of cash held by defendant in 1944, undertook to trace an income tax history from 1928 to 1945, in the process of which Exhibits 6, 9, 10, 11, 13 and 14 were introduced in evidence. Exhibits 6 and 13 were certificates of income tax

payments and assessments over this long period of years. Exhibit 6 was received by the Court over objections of counsel (54), and the same is true of Exhibit 9 (96). An ancient bank ledger sheet constituting Exhibit 10 was admitted over objection of counsel (70-71); likewise the Exhibit 13 (72-74).

Yet, on the basis of these Exhibits 6 and 13, the Court, in the face of objection of counsel, allowed the Government witness Whitsett to engage in a fantastic process of computation for the purpose of ascertaining by artificial means certain unknown facts which, in the witness's opinion, thereby were ascertained relating to defendant's gross income from 1928 through 1944 (162-165). Motion to strike all of this evidence was denied by the Court (166). It must be obvious that this process of computation could have no possible value directly or indirectly in the face of admitted cash in hand in 1944 of more than $18,000.00. The only theory upon which the evidence could possibly have been introduced was to corroborate the Government agent's claim that the defendant had made extra-judicial statements establishing the amount of cash available at the beginning of the prosecution period in the sum of $1,000.00 (162, 165-166). It is not apparent how his income tax payments during the years 1928 to 1944, inclusive, even though translated by the Government agent into terms of gross income less living expenses (which were, of course, sheer opinions on the part of the Government witness concerning matters about which he could not possibly have any knowledge), would have any relevancy in view of the established fact that the defendant in 1944 had $18,595.12 cash in hand, and the Government was unable to show what had happened to this money.

The facts in this case are utterly different than in the *Smith* and *Calderon* cases, supra, with respect to corroboration of extra-judicial statements concerning cash on hand at the beginning of the period. In neither of those cases was there any such evidence respecting cash in the hands of the defendant shortly before the beginning of the prosecution period. In the light of the admitted existence of the large sum of cash in the hands of the defendant in 1944, it is impossible to understand the relevancy of Exhibits 6 and 13, or of the agent's testimony concerning income tax payments and probable gross income and expenses of the defendant during the years 1928 to 1944, inclusive, *except upon the theory that it would greatly prejudice the jury against the defendant.*

It is the opinion of counsel that the defendant was greatly prejudiced by this testimony and that its having been received by the Court and the Court having declined to strike it that the defendant was precluded from having a fair or impartial trial. In this connection it is difficult for an appellate court to fully understand the thoroughly sinister implications of such testimony coming from the mouth of a Government agent, or to understand the impression that it makes upon twelve ordinary laymen.

In this instance the Government certainly had a duty under the burden of proof rule to show the disposition of the whole or a substantial part of this cash which came into the hands of the defendant in 1944 prior to the beginning of the prosecution period, and to show that that cash, or a substantial part of it, did not account to some extent for the apparent increase in his net worth during the prosecution period, and under the circumstances could not provide any corroboration for the defendant's alleged extra-judicial statement concerning cash on hand at the beginning of 1946,

and under the rule announced in *Smith v. U. S.* and *U. S. v. Calderon,* supra, the judgment of the lower Court should be reversed upon the foregoing ground alone.

It is contended that the district court erred in submitting this case to the jury as a net worth case. The evidence established that the defendant kept a regular set of books of average quality (336-337). The Government's evidence showed that every item of professional income was entered in the books of the defendant (98, 115, 126). The Government's evidence showed that the defendant, in his relations with his office bookkeeper, stressed the importance of accuracy in the keeping of the books and records (100, 111, 113), and that true and correct books and records were kept and made available to the Government.

The Government made little effort in its investigation to trace even recent sources of non-taxable income about which it's agents had knowledge and which was received by the defendant during the prosecution period. No allowance was made for an unrepaid loan received from a Mrs. Linsenmeyer by the defendant in the amount of $3200.00 or $3500.00 in 1947, nor was any effort made by the Government agents to verify the fact that such loan had been given to the defendant (244, 289).

The Government investigators apparently brushed aside evidence of gifts of money received by the defendant or his wife during the prosecution period (259, 284, 301).

The Government investigators ignored assets in the form of life insurance, consisting of policies which the defendant had maintained for years and which presumably would have considerable cash value, the principal sum of which aggregated approximately $45,000.00 (291, 309). These are not the kind of "leads" spoken of in the case of *Holland v. U. S.,* supra, 133, by Mr. Justice Clark when he said:

> *"Sometime these 'leads' point back to old transcations far removed from the prosecution period. Were the Government required to run down all such leads it would face grave investigative difficulties; still its failure to do so might jeopardize the position of the taxpayer."* (Emphasis supplied)

These clues were based upon transactions of comparatively recent origin or assets recently held by the defendant and were perfectly susceptible to investigation. The duty of pursuing these leads had no relationship to the "investigative difficulties" referred to by the Supreme Court in tracking down ancient clues.

Counsel respectfully urges to this Court that the Government neglected the duty which is consistent with the burden of proof resting upon the Government in this case, and in the words of the Court in *Holland v. U. S.*, supra:

> *"* * * its failure to investigate leads furnished by the taxpayer might result in serious injustice."* (Emphasis supplied.)

Is this not a proper case for the application of the procedure suggested by Mr. Justice Clark in *Holland v. U. S.*, supra, page 137, when he said:

> *"When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done."* (Emphasis supplied.)

II. The Prosecution Is Limited in the Presentation of Evidence to the Area Embraced in the Bill of Particulars.

(Specifications of Error Nos. VI and IX)

It will be noted that in the case at bar the Government on two occasions filed bills of particulars pursuant to orders of the Court (11-14, 20-22) and on one occasion voluntarily made and filed an amended bill of particulars (16).

An examination of these documents discloses a continuous process on the part of the Government of shifting its position, changing its theory of the case, changing its computations, only to have such computations further changed in the trial of the case.

It is the contention of counsel that nowhere in the particulars set forth by the Government is there any indication that the Government relies for conviction of the defendant upon the charge of tax evasion by means of willfully taking improper deductions or improperly computing depreciation reserves, and that in the introduction of such evidence over objection of counsel, and in denying motions to strike such evidence the district court allowed the Government to freely depart from the field of proof embraced in its bill of particulars, and in so doing committed reversible error.

The general rule is well stated as follows:

> "After the filing of the bill of particulars the state is confined in its proof, it is held, to the items therein set out, although it is held on the other hand that, where an information is sworn to positively, its scope is not limited or controlled by the fact that it is accompanied by a bill of particulars. In any event, any evidence otherwise competent tending to establish the transaction set forth in the bill of particulars is admissible. The right of the defendant to rely on a bill of particulars as limiting the scope of the evidence may be waived by failure to call attention thereto until the close of the argument or the trial. A bill of particulars

as to one count does not limit the scope of the evidence as to other counts."

31 C. J., p. 753, Sec. 310.

"A bill of particulars ordinarily is not a part of the indictment or information although the prosecution usually is confined in its proof to the transactions set out in the bill." (Emphasis suplied)

42 C. J. S., p. 1101.

"Limitation as to proof. After the filing of the bill of particulars the prosecution is confined in its proof to the items therein set out, * * *"

42 C.J.S. p. 1103.

In the case of *U. S. v. Glasser,* (C.C.A. Ill.) 116 F.2d 690, 702, Cert. denied 61 S.Ct. 835, 213 U.S. 551, which was a conspiracy case in which the bill of particulars set out certain specific overt acts, the Court said:

"The object of the bill of particulars is to give the defendant notice of the specific charges against him and to inform him of the particular transactions in question, so that he may be prepared to make his defense. Its effect, therefore, is to limit the evidence to the transactions set out in the bill of particulars."

The case of *Land v. U. S.* (C.C.A. 5th, 1949), 177 F.2d 346, 348, held that proof of a date at slight variance with the bill of particulars not sufficient to justify a reversal.

In *Berger v. U. S.,* 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1313, the rule is stated:

"* * * that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial."

III. Defendant's Rights Were Prejudiced by the Introduction by the Government of Improper and Incompetent Evidence and Defendant Was Thereby Deprived of a Fair and Impartial Trial.

(Specifications of Error Nos. VI, VII and VIII)

In connection with the testimony of the witness McGurkin (53-56), the Court accepted the offer of Government's Exhibit No. 6 (54) over objection, although the Court did sustain objections as to questions requesting the witness to relate the contents of the exhibit. The exhibit was a certificate of taxes and assessments of the defendant for a long period of years prior to the prosecution period. Aside from the fact that the exhibit was actually not properly identified, the harm done by admitting the exhibit was in no wise cured by sustaining objections to the witness's attempt to detail the contents of the exhibit verbally.

In connection with the Government's witness Clarence J. Beale (59-68, 86-96), this witness was brought on by the Government to present testimony relating to the defendant's earnings from the United Verde Extension Mining Company during the years 1934 and 1935 when he was employed as a company doctor (65). The witness related that although he did not keep the payroll record of the defendant's employment and could not find such payroll records, he had found a card on which there were certain entries in the handwriting of a deceased employee of that company whose handwriting he recognized pertaining to defendant's earnings with the company during the period in question (63, 65, 91).

This exhibit was identified as Government's Exhibit No. 9 and was objected to on grounds of competency and irrelevancy (60-63). The witness admitted that the actual payroll records which could not be found would have to be consulted

in order to verify the correctness of the entries on Exhibit 9. Notwithstanding renewal of the objection to Exhibit 9 (82), the said exhibit was admitted by the Court for "what it may be worth so far as it goes" (96).

The Government produced a witness by the name of Robert F. Herre, a special agent attached to the Bureau of Internal Revenue at St. Louis, Missouri, and who had held that position since the spring of 1948. This witness was a man who had never seen the defendant until the date of the trial and had at no time in his life ever had any conversation with the defendant (77). This witness was strictly a *hearsay* witness. He had no competent evidence to offer, as must have been apparent to the United States Attorney prior to having the witness sworn. An example of the type of evidence offered, which, by the way, pertained to the period when the defendant was in college or medical school, in St. Louis, is illustrated as follows:

> "Mr. Parker: I am reluctant to suggest that we are now approaching the ridiculous. This covers a period when he was in college, way back in the 1920's before he ever started any professional practice in medicine. I fail utterly to see the materiality of it. I assume that it is offered on the theory that it is prejudicial. I know of no other theory upon which it could be offered.
>
> Mr. Roylston: I will assure the Court it isn't offered on that theory. It may seem ridiculous, but the only way I know to conduct this type of case is to go back and cover any period in which the defendant might have had any substantial amount of income. Even though he was in college or internship, other than this there is no way to show he may have had any income, he may have been making any fabulous amount so far as we know.
>
> Mr. Parker: This doesn't show what his income was.

Mr. Roylston: It shows he didn't file a tax return.

Mr. Parker: Well, now, we are debating over this exhibit and you are now stating to the jury what you think it shows. I don't recall filing a tax return when I was in college either. I don't know what that has to do—

Mr. Roylston: If it please the Court—

Mr. Parker: I doubt if Mr. Roylston filed a tax return while he was in college.

Mr. Roylston: That is correct.

Mr. Parker: But I don't think I would suggest that is material whether or not he properly filed for 1953.

Mr. Roylston: If we are trying to establish my net worth in 1953 it certainly would be material whether I had any income a few years ago or any substantial income. It is offered solely for that basis, to overcome the probability of any substantial income during those years which might account for this great increase in net worth in later years.

Mr. Parker: I submit it doesn't prove anything.

Mr. Roylston: It is offered.

Mr. Parker: He may have had a wealthy family and his earnings wouldn't make any difference. I don't think it is of any great significance, your Honor. It seems to me it goes far afield. If the Court feels it has any probative value, the Government is being deprived by not having this in. I am not going to object further to it but I am at a total loss to understand—

The Court: I don't know at this time whether it will be worth anything to the jury. However, I take it there will have to be a great deal more evidence before anybody can determine that. I am going to *admit it because I don't think there is any great prejudice.* I don't see how there could be. That is 13 in evidence. (Emphasis supplied.)

(Government's Exhibit 13 marked in evidence.)

Q. (By Mr. Roylston): Mr. Herre, in connection with your investigation what was the next thing you did?

A. I contacted the St. Louis University Medical School and searched their records for anything that would be of significance in this case.

Q. For what particular years was that to cover?

A. That was to cover the years October, 1928, to June, 1932.

Q. Did you find any evidence of employment during the school years?

A. No.

Q. What was the next thing you did in this investigation?

A. I determined the place of abode of Mr. Lutfy at the time he was attending St. Louis University. During part of that time he was staying at 3515 Park Avenue, which was a rooming house.

Q. All right, sir, and what else?

Mr. Parker: I take it, if your Honor please, this must be all hearsay. I don't see how it could be otherwise.

The Court: Are you objecting to it?

Mr. Parker: I do.

The Court: The objection will be sustained.

Q. (By Mr. Roylston): What was the next thing you did in your investigation, Mr. Herre?

A. All of the banks in St. Louis and all of the banks in St. Louis County surrounding the city of St. Louis were contacted to determine whether or not they had any business transactions of any kind whatsoever with Lutfy.

Q. What period of years was that to cover?

A. That covered the period 1928 to 1933.

Q. Were you able to discover any records in the banks in that area?

A. There were no records.

Mr. Parker: Just a moment. The further objection on the ground it is hearsay.

The Court: The objection will be sustained. That's not proper, Mr. Roylston, to have a witness come here

and testify as to the existence or nonexistence of records when he has just gone in there and inquired. The jury will disregard the last answer of the witness.

Mr. Roylston: If it please the Court, it is my understanding that the only way the Internal Revenue could obtain any of those records was inquire for the specific records and if the banks report they don't have those records the only thing we can do is produce the agent to testify to that fact.

The Court: No, you can produce the people at the banks. They are the ones that have the knowledge. What they tell this witness is strictly hearsay. How would counsel cross-examine a witness who appears as this one does. All he says is, 'They told me they didn't have them.'

Mr. Roylston: Yes, sir.

The Court: Assuming counsel should have reason to believe there were some records, how in the world could he cross-examine this witness. If you had somebody from the bank there is a very effective way of cross-examining them.

Mr. Roylston: There was about fifty banks in the area and I didn't think it would be incumbent for us to bring a representative from each bank to state there were no records.

The Court: The fact it may be burdensome, Mr. Roylston, it isn't any basis for hearsay evidence.

Mr. Roylston: All right, sir, I won't let it go any further.

Q. (By Mr. Roylston): Did you do anything further in your investigation, Mr. Herre?

A. The records of the city of St. Louis and St. Louis County pertaining to property transactions, liens, mortgages, chattel mortgages, were searched in an effort to find the name of Lutfy.

Q. Did you search those records yourself?

A. I personally searched the records.

Q. What were the results of your search?
A. They were negative.
Q. You found no record?
A. I found no record of Lutfy.
Mr. Roylston: Cross-examine." (72-77)

The Government then brought on the witness John L. Fairfield (68-70). This man had held the position of Manager of the Verde Valley Branch of the Bank of Arizona for three years prior to testifying (69). The two branches of this bank, namely, the one at Cottonwood where this witness was manager, and a branch at Clarkdale, a neighboring town, had been consolidated, and the witness testified that he had found an old ledger sheet bearing the name of the defendant in the records of the Clarkdale branch of the bank, and this ledger sheet was offered as Government's Exhibit 10 and received in evidence by the Court, over objection, with the following words:

"It will be admitted for whatever it may be worth." (Emphasis supplied.)

The Government's star witness was Howard H. Whitsett, a revenue agent from the Phoenix office, and this witness frequently volunteered statements which were either calculated to create prejudice or at least had that effect. This witness also freely broadcast opinions concerning the facts, both evidentiary and ultimate. The following exerpts from the testimony of this witness illustrate the matters referred to:

"A. I asked him where the rest of the costs were that went to make up this $30,000. He said that after the office building was built he had some changes and additions to things and took me around the office and showed me a new drinking fountain, he had to have a metal door put in the X-ray room and a special type of

plate for his X-ray room; a *few small items but didn't, to my mind, add up to $9,000.*

Mr. Parker: *I move to strike the last statement* of the witness.

The Court: *It may be stricken, that part of the* them would add up to $20,000 as claimed." (Emphasis supplied.) (147)

"A. Yes, I asked him about medical equipment, new, as $13,000, and X-ray equipment listed as $7,000.

Q. Did he reply to that question?

A. *He had very little in his files to substantiate that total of $20,000;* he again took me through the office and showed me some medical instruments——'this one cost $300, this one $500, you can see how much I have. It amounts to quite a bit of money.' I asked him if he had anything to show me when those were purchased to prove they hadn't been deducted as expense in the year in which they were purchased and not capitalized, and since he didn't have it on hand at that moment, I would have to get the bills and statements from the various surgical supply houses, so that we could verify the figure and check it against the expense accounts he had listed for those years *and for the year they had already been deducted as expense,* and if the total of them would add up to $20,000 as claimed." (Emphasis supplied.) (148)

"* * * I went to the banks and totaled the bank deposits for the two or three years, including '47——'46, 47 and '48, to see how close his total bank deposits came to his total receipts as reported on the return, *and they were somewhat larger.* It was at that time that I stopped my investigation and waited until we could have a joint investigation with the Intelligence Unit.

Q. Explain a little further what you mean by 'joint investigation'; just what that is?

Mr. Parker: I anticipate the witness is about to express his opinion about the case, what the agent did,

and thereupon having arrived at a conclusion he turned it over to somebody else. I take it this witness has probably testified in many courts and understands that the defendant should not be prejudiced by his opinions regarding the merits of the case.

Mr. Roylston: I will withdraw that question.

Q. You stated that you stopped your investigation until there could be a joint investigation with the Intelligence Unit?

A. Yes.

Q. What is the Intelligence Unit?

A. The Intelligence Unit is the branch of the Treasury Department that does the investigation in the *cases of fraud* or——

Mr. Parker: If the court please, the witness is now stating his opinion about the case.

Mr. Roylston: He is stating what the Intelligence Unit is.

Mr. Parker: It is immaterial.

The Court: It may stand." (Emphasis supplied.) (149-150)

"Q. What were the results of your investigation in connection with those four different methods of bookkeeping?

A. We found names and amounts on the deposit tickets we didn't find on the log book or on the patient's cards or on the receipt books. We found names in the log book we didn't find on the deposit tickets or on the patient's cards nor on the receipt books. We found names on the patient's cards, we found names and amounts, we didn't find were on the log book or were on the bank deposit tickets; and it was at that time that we discussed this with the Doctor and he said that evidently the log book was not complete, as we showed him patient receipts that weren't on it. He had destroyed some of the patient's cards that weren't regular patients and the receipts were only made out for the credits received directly into the office, not

from mail receipts; so that no one record was complete enough to be positive that that was the entire receipts from the practice; and it was at that time we were forced to proceed on the net worth basis of arriving at the Doctor's income for the years in question." (152-153)

As an illustration of the sinister atmosphere which the witness Whitsett apparently sought to create are the two contrasting versions of testimony concerning a letterhead and trivial bank account which the defendant had in the name of "Phoenix Sport Shop". Government's witness Whitsett gave the following version of the matter, loaded as it is with overtones of accusations of attempted concealment aimed at the defendant:

"Q. Did you have an further discussion with Dr. Lutfy at that time concerning any books or records of the Phoenix Sport Shop?

A. He had a file of correspondence, but there was no book—we had no record of—a complete record of receipts. We asked him if he had a bank account and he said, 'Yes, he had a bank account in the Bank of Douglas in the name of Phoenix Sport Shop.' Up to that time we asked him if he had any other bank accounts and he said, 'No.' We had all the records of the bank accounts he had but there was none. We were unable to get any clear listing of the purchases or sales to this Phoenix Sport Shop or Dr. Lutfy Company.

Q. After Dr. Lutfy told you he was the Phoenix Sport Shop, did that enter into your consideration whether you should resort to the net worth method of computation in this?

A. Yes. We had no way of figuring whether there was any income from that at all because there were no records whatsoever.

Q. You stated that you resorted to the net worth method of computation after you examined the Doc-

tor's books and records and had discovered this Phoenix Sport Shop. Explain to the jury what you mean by the net worth method of computation." (154-155)

The wife of the defendant, Bertha A. Lutfy, explained the matter in the following language:

"Q. Now, Mrs. Lutfy, you know about the Phoenix Sport Shop?

A. Yes.

Q. I believe there is an exhibit here in the form of a letterhead introduced by the Government. I don't believe this is the one. I thought the sport shop letterhead had been introduced. Well, tell me this, do you know how and for what purpose the business title or name Phoenix Sport Shop was created or originated?

A. Yes.

Q. Will you state to the jury what that was?

A. Well, I wanted to go in business and at the time I wanted to go in the import and export business because I had connections with an importer and exporter in San Francisco who is a friend of mine. Then you couldn't get the things at that time, you just couldn't get the merchandise, so my husband decided he wanted to have a sport shop. Instead of an import and export he would have a sporting goods shop. That is how this started, the Phoenix Sporting Goods.

Q. Did he ever, besides printing letterheads, did he ever actually open the sporting goods store?

A. No.

Q. Why didn't he, if you know?

A. You couldn't get anything. The good things you couldn't get.

Q. Did he maintain those letterheads over the years of '46, '47, and '48?

A. He had them at that time.

Q. Do you know what use he made of that firm name, that business name during that period?

A. He bought several guns for relatives and friends.

Q. Buy any for himself, do you recall?

A. Yes.

Q. How many, do you know approximately?

A. I would say, probably, two of them.

Q. Two?

A. Yes.

Q. Would you have any idea how many he bought for friends?

A. I never kept track, but I would say not more than six or eight.

Q. Mrs. Lutfy, was there any advantage, to your knowledge, in making these purchases for friends or for yourself in the name of the Phoenix Sport Shop?

A. There was a big saving. He got them wholesale.

Q. He got them wholesale. Do you know of your own knowledge whether or not he made any profit on guns that he purchased for friends?

A. No, he didn't.

Q. He did not?

A. No. He would usually show them the statement." (302-303)

On cross-examination Government's witness Whitsett admits that defendant did explain to him rather fully the purpose of establishing the name "Phoenix Sport Shop" and the extent of its activities (254).

The prejudice created by Whitsett was further aggravated by the ruling of the Court denying defendant's objection to having the U. S. Attorney simply turn this professional witness loose without the necessity of eliciting the testimony by interrogation:

"Q. (By Mr. Roylston): Now, Mr. Whitsett, in regard to this net worth statement, Government's Exhibit No. 33, will you start out from the very first of that and explain what the different items are on it and

how you arrived at those figure, and as we go along, there will be a few items I want to ask specific questions about, but if you start under assets and explain how you set it up and tell us what each item is?

Mr. Parker: Although it may be a little bit slower, it would be far easier to make intelligent objections if this could be by interrogation rather than turn the witness loose and say, 'go ahead, say anything you want to about this exhibit.' It is rather a long one.

Mr. Roylston: He can talk about anything on there, and anything else I will interrupt.

The Court: I will permit you to proceed as proposed. However, if the witness goes beyond what he has been asked, counsel can object and if that happens we can probably do it by question and answer." (160-161).

A particular prejudicial and whimsical accumulation of opinions voiced by Whitsett on matters of which he could not possibly have knowledge is found in the following:

"* * * On 1934 income maximum without paying any tax would be $1,111.11. 1935 on tax paid, $82.56, the maximum amount of income would be $34.04, $4,400. In 1936 there was no tax. The maximum amount of income was still the same, $1,111.11. In 1937 the Doctor was married and had the additional exemption of his wife and he paid no tax. The maximum amount of net income would be $1,944.44. In 1938 he paid no tax. The maximum amount of income would be $2,777.77. In 1939 he paid tax of $7.33, and at that time he had one child. The maximum amount of income would be $3,452.83. In 1940 he paid no tax. The maximum amount of income was $2,744.44. In 1941 he had two children and the tax paid was $44.57. The maximum income would be $3,793.61. In 1943 he had three children and the maximum amount of income for that year was $2,350, computed in conjunction with the '43 return. In 1943 we had his return and he reported an income of

$6,220.80. In 1944 we had his return and he reported income of $9,779.57. In 1945 we had his returns showing his income at $6,030.98. The total from 1934 to 1945 was $44,721.10. *I then applied an estimated living expense against this income of $1,000 a year for the years 1934, 1935 and 1936.* He was married in 1937 and *I allowed $1,500 living expenses; 1938, $1,600; 1939 he had one child and it raised it to $1,800; 1940 to $1,800; 1941 with three children, $2,000; 1942 to $2,400; and for '43 and '44, $3,600 each year.* In 1945 when he had his checks we made an analysis and arrived at personal checks of $6,842.02. *The total living expenses for those years, '34 to '45, $28,142.02. Taking these estimated living expenses for those years away from the maximum income of $44,000, left a balance available for investments of $16,579.08, and the total net worth we have as of 12-31-45 on page 3, total of the first column is $58,337.20, and that discrepancy between the maximum amount available and the amount of assets on hand we allowed the $1,000 cash that the Doctor estimated he would have on hand as of that date.*

Q. All through this method of computation which you just described, you arrived at the $1,000 figure, which is on page 1, independent of the Doctor's own statement of the estimate?

A. Yes.

Mr. Parker: If your Honor, please, at this time we move to strike all of that answer because it is evidenced he dreamed it up out of his imagination. It is obvious. He doesn't state he knew what the Doctor's living expenses were.

The Court: We end up with a result where he says he went along with the Doctor. I mean, there is really no calculation in that. When he is all through, he ends up with the statement that in taking all these into account he went a long way. He went along and allowed the Doctor $1,000 and $500 he claims.

Mr. Roylston: Yes, sir. That is what we were getting at. This $1,000 on here, it is to establish a starting point.

The Court: It may stand." (Emphasis supplied.) (164-166.)

With respect to Government's Exhibit 33 which is the Government's net worth figures (copies of which were supplied to each individual juror), the following is an example of the extent to which this witness went in making his own adjustments in accordance with his tastes in the figures used in preparing the net worth computation:

"Q. Did you make any adjustment on the claimed depreciation as far as your computation is concerned?

A. Yes. In the years when he had one automobile, I adjusted it to 80% business and 20% personal.

Q. To 80% business and 20% personal use?

A. That is right.

Q. These are the years when he had one automobile?

A. Yes." (174-175)

In a similar vein is this witness's treatment of the casualty loss on the Lincoln automobile which was stolen in late 1947:

"Q. The next item under Living Expenses is Lincoln Continental Convertible, and under the year ending '47 you have listed $5,420. Will you explain why this particular automobile is listed under the living expenses?

A. That automobile was an automobile purchased by the Doctor in the fall of 1947 and it was stolen, and the Doctor, of course, had insurance and sued to get recovery from the insurance company; *so there was no loss to be allowed on that until there was a final settlement by the insurance company.* That is an income tax regulation that if you have a claim you have no loss until the claim has been settled.

Mr. Parker: I move to strike that statement. The witness is not giving us a lecture on the law of income tax. I have no objection if he states what he did in connection with this, but we disagree with him most stringently on the point.

The Court: When the witness refers to the law, we will instruct the jury that the witness means his version of the law *as a tax expert* and his understanding of the regulations. That is what we will understand, Mr. Parker, just as when your expert takes the stand. We will have the same understanding." (Emphasis supplied.) (196-197).

Contrast the foregoing with the statement of the public accountant who testified at the instance of the defendant:

"Q. Secondly I would like to know whether or not it is in accord with sound tax accounting practice to charge off a stolen car where the insurance company has refused to pay or denied liability——

Mr. Roylston: I object to that as this man's conclusion on a matter of law.

The Court: May I have the question, please?

Mr. Parker: I hadn't finished the question.

Mr. Roylston: Excuse me. I withdraw my objection.

Q. (By Mr. Parker): And then upon recovery to report the net recovery as income and pay tax on it?

Mr. Roylston: Then I make the objection as stated before.

The Court: Objection sustained as to that.

Q. (By Mr. Parker): I will put this question to you, Mr. Moser: In the course of your audit did you find that Dr. Lutfy did recover a judgment against the insurance company arising out of the theft of that Lincoln Continental automobile?

A. I did.

Q. And did you find in the course of your audit that upon recovering that judgment for the theft of that autombile reported it as income at a later——

Mr. Roylston: I object——maybe I interrupted too soon again.

Q. (Continuing): ——on a tax return for the year on which he made the recovery?

Mr. Roylston: I object unless the year is given. If they give the year then I have no objection.

Mr. Parker: I am not absolute as to the year. What year was it that he reported——

A. The year 1950.

Mr. Parker: Does that satisfy your objection?

Mr. Roylston: Yes, sir.

Q. (By Mr. Parker): Did he report it as income and pay tax on the recovery for that stolen automobile in the year 1950?

A. He did.

Q. Is there anything unusual from an accounting point of view about his charging off when stolen and reporting it back as income when he recovered on it? Is that objectionable to you?

Mr. Roylston: I object to that on the ground it is calling for a conclusion of this witness.

Mr. Parker: I submit the witness is an expert.

The Court: He may answer that.

Q. (By Mr. Parker): Is there anything unusual about that?

A. Under the particular circumstances, no." (355-357)

As to the damage obviously created by the opinions broadcast by this revenue agent, we call the attention of the Court to his description of defendant's *unreported income* (200-201) which he later admits is really a question of what deductions are allowed or disallowed:

"Q. The fact is, Mr. Whitsett, that what you mean by unreported net income is simply this: that the taxpayer arrived at one concusion after making the deductions claimed by him as to his net income, and

you after exercising your judgment as to what deductions were proper arrived at another figure?

A. That is right.

Q. That is what it amounts to, isn't it?

A. That is right." (219)

There were two real estate transactions involving purchase and sale at a profit of real estate owned by or in which the defendant had some interest, both of which the revenue agent treated as short-term gains and fully taxable in the making of his computations, whereas, the evidence as to the first of such transactions shows that the property was purchased and escrow papers signed and a deposit on the purchase money made April 4, 1945. The new purchasers, which included the defendant, took over the property and received the rents and profits thereform from June 15, 1945. However, one of the sellers was a minor child who did not attain age 21 until July 26, 1945 and who thereafter executed a deed on August 10, 1945. The sale of this property was signed by the buyer on January 18, 1946 and by the last of the sellers on January 21, 1946. All of these facts are set forth in detail in Government's Exhibits 24 and 25 and pages 222-229 and at page 264 of the printed Transcript of Record.

As to the second such transaction the facts are set forth in Government's Exhibits Nos. 20 and 23 and Transcript of the Record, pages 228-231, 264.

In contrast to the revenue agent's treatment of these transactions, the attention of the Court is directed to testimony of the defense witness Moser where both the transactions are confidently treated as long term capital gains (346-347).

CONCLUSION

Counsel for defendant readily confesses to the Court that had the net worth decisions of the Supreme Court of December 6, 1954, been available at the time of the trial of this case, a considerably different record might have been made with respect to the proper preservation of objections and making of proper motions patterned to the rules laid down, particularly in the *Holland, Smith* and *Calderon* cases. However, the rules and standards established by the Supreme Court in those cases are no less applicable to this case, notwithstanding that neither the Court nor counsel had the advantage of those decisions at the time of the trial of the case and the institution of the appeal.

On behalf of defendant we respectfully urge to this Court that the Government's net worth proof was faulty in the extreme, and even if taken at face value was fully explained and reconciled with the revenue laws and regulations and established tax accounting practices in the testimony of the Certified Public Accountant, R. Dale Moser (325-441).

It may be argued by counsel for the Government that, ignoring all of the evidence relating to net worth, there still remained in the record sufficient evidence to go to the jury on the question of attempt to evade the payment of income taxes. As to this contention two things are present. One, the net worth evidence having been submitted and computation sheets having been placed in the hands of the jurors, there is no possible way of determining the impact of that evidence and the influence of it on the minds of the jurors with respect to other or so-called independent evidence upon which the verdict might have been predicated and; two, the evidence concerning improper computation by the defendant of depreciation allowances, even though reconciled by showing that the defendant might have con-

sistently with law taken even greater depreciation reserves than he did take, runs into the question of whether or not such evidence was outside the scope of the Government's bill of particulars and amendments thereto. It seems reasonable to say that the evidence on depreciation was by far the strongest evidence offered by the Government outside of the net worth evidence. We respectfully submit that this evidence went beyond the scope of the bill of particulars, and the objections to it and motions to strike it should have been ruled upon favorably to the defendant.

Counsel for the defendant having from past experience been accustomed in criminal cases of such importance to the limiting of witnesses to factual matters, was amazed and not a little stunned when the Government revenue agent, by the nature of whose work is a more or less professional witness, is permitted to freely broadcast opinions in the course of his testimony and to make statements of a derogatory character respecting a person on trial. The ordinary citizen stands a bit in awe of Government officials, including laymen who serve on juries, and the damage which can be quietly and cleverly done to the rights of the accused by a smooth speaking Government witness is incalculable. For that reason and the other reasons set forth in this brief, counsel sincerely urges this Court to reverse the conviction of the defendant in the court below and to direct that a new trial be granted.

Respectfully submitted.

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